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JOHN T. FEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 600

J. M. HUBER CORP., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *et al. Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HENRY H. FOWLER
1701 K St., N. W.
Washington 6, D. C.

Counsel for Petitioner,
J. M. Huber Corporation

Of Counsel:

MARX LEVA
ROBERT MARTIN
FOWLER, LEVA, HAWES & SYMINGTON
1701 K St., N. W.
Washington 6, D. C.

SPENCER W. PITTS
Red Bank, N. J.

THOMAS O. MOXCEY
Borger, Texas

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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J. M. HUBER CORP., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on August 31, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 4a)[1] is reported in 236 F. 2d 550. The order of the Federal

[1] References to "App. ...." are to the printed appendices attached at the end of this petition.

Power Commission (R. 29a)[2] is not as yet reported. The decision of the Presiding Examiner (R. 6a) is not as yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Did the court below err in extending the decision of this Court in the *Phillips* case[3] (holding that despite the production and gathering exemption set forth in Section 1(b) of the Natural Gas Act, the Federal Power Commission had jurisdiction under Section 4 of that Act over the *rates* at which independent producers could sell natural gas in interstate commerce for resale) to the wholly different legal and factual situation presented by this case, where the issue is whether the Commission has jurisdiction, under Section 7(b) of that Act, over an independent producer's abandonment of production or gathering facilities and services relating to a sale in interstate commerce?

Should not this case, instead of being decided on the basis of an improper extension of the *Phillips* decision, be governed by the rationale of this Court's decision in the *Panhandle* case[4] (holding that Section 1(b) removed production and gathering facilities from

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[2] References to "R. ...." are to the printed appendix to petitioner's brief in the Court below, which is part of the record certified to this Court.

[3] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[4] *F.P.C.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949).

the Commission's jurisdiction over abandonment under Section 7(b))?

Are an independent producer's production and gathering facilities, which are otherwise exempt from Commission jurisdiction by Section 1(b) of the Natural Gas Act, rendered subject to the Commission's jurisdiction over abandonment under Section 7(b) of that Act because those facilities also are used in or useful to a sale of natural gas in interstate commerce?

Can the Commission issue a certificate of public convenience and necessity, pursuant to Sections 7(c) and 7(e) of the Natural Gas Act, to an independent producer who is unwilling to render the service involved, and compel that independent producer to accept the certificate and to continue to render the service which the producer has sought to terminate?

STATEMENT OF THE CASE

This case involves a basic issue permeating a substantial area of Federal Power Commission[5] regulation of independent producers and gatherers under the Natural Gas Act, as amended,[6] which has not heretofore been decided by this Court. This Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954) resolved the fundamental issues pertaining to the interrelation of the production and gathering exemption of Section 1(b) of the Act (Title 15, U.S.C., Section 717(b), 52 Stat. 821) and the Commission's *rate* jurisdiction, as set forth in Section 4 of the Act, (Title 15, U.S.C., Section 717c, 52 Stat. 882). This case presents the wholly different and equally impor-

[5] Hereinafter referred to as the "Commission".

[6] Hereinafter referred to as the "Act". The pertinent provisions are set forth in Appendix A to this petition.

tant question of the interrelation of the producing and gathering exemption and the Commission's jurisdiction over *certification and abandonment of facilities and services*, as set forth in Section 7 of the Act (Title 15, U.S.C., Section 717f, 52 Stat. 824, 56 Stat. 83).

The proceedings in the Court below were pursuant to Section 19(b) of the Act, (Title 15, U.S.C., Section 717r(b), 52 Stat. 831), to review an order of the Commission. This order required the petitioner, J. M. Huber Corporation,[7] an independent producer of natural gas, to continue to sell natural gas produced from eleven wells in the West Panhandle field of Texas, of which Huber is the lessee, to the Northern Natural Gas Company,[8] an interstate pipeline company. Huber also was required to accept a certificate of public convenience and necessity covering this sale. This controversy concerns the power of the Commission to compel such action where Huber desires to abandon the deliveries of gas to Northern, has asserted its private contractual right vis-a-vis Northern to terminate deliveries, and has notified the Commission of its unwillingness to continue the service or to accept a certificate of convenience and necessity therefor.

Petitioner's basic position is that the Commission has no jurisdiction over the abandonment of its deliveries to Northern. Observing that the Commission's jurisdiction over abandonments of service is specifically restricted to services rendered by means of facilities subject to its jurisdiction (Section 7(b), Title 15, U.S.C. Sec. 717 f(b), (52 Stat. 824), Huber contends that its facilities utilized in connection with the sale

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[7] Hereinafter referred to as "Huber".

[8] Hereinafter referred to as "Northern".

to Northern are "production" or "gathering" facilities, exempt from the Commission's jurisdiction by Section 1(b) of the Act. Petitioner argued that the principles enunciated in the decision of this Court in *F.P.C.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949), which held that the producing and gathering exemption of Section 1(b) removed certain gas leaseholds from Commission jurisdiction under Section 7(b), are equally applicable to the facilities here in question.

Huber further contends that the Commission cannot issue to Huber, which is neither "willing" nor an "applicant" within the meaning of Sections 7(c) and 7(e) of the Act, (Title 15, U.S.C., Sections 717(c), 717f(e), 52 Stat. 824, 56 Stat. 83), a certificate of convenience and necessity, and that, since the sale to Northern is unlawful in the absence of certification by the Commission, Huber must be permitted to terminate the sale.

Both the Commission and the court below rejected petitioner's contentions as outlined above. Instead of applying the rationale of the *Panhandle* case, *supra*, to fix the ambit of jurisdictional abandonments under Section 7(b), they chose to extend the doctrine of *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) from rate regulation under Section 4 to abandonment of facilities and services under Section 7(b). In substance both the Commission and Court below ruled that wherever a sale of natural gas could be regulated as to rates, all facilities used or useful in effecting deliveries of that gas were subject to Commission jurisdiction without regard to whether they were "producing" or "gathering" facilities within the meaning of the exemption in Section 1(b). They

coined a new and sweeping concept of "sales facilities" as a basis for jurisdiction which overrides and ignores the producing and gathering exemption. (App. 11a; R. 17a-19a).

In the absence of an overruling or reconsideration by this Court of its decision in the *Phillips* case, Huber does not challenge the conclusion that under the *Phillips* decision the sale to Northern is a sale in interstate commerce for resale which is subject to the Commission's rate jurisdiction and makes Huber a "natural gas company" if the sale is continued. These were the issues in the *Phillips* case. Even though the facts of the present case are different, in that Phillips processed as well as produced and gathered the gas, Huber does not seek to litigate whether any *rates* it might charge are within the ambit of the *Phillips* decision. What Huber does challenge is the extension of jurisdiction over rates in sales in interstate commerce to jurisdiction over the abandonment of that service when rendered by "producing" or "gathering" facilities.

The background, facts, and procedural history of this controversy are as follows:

Pursuant to a contract dated April 21, 1936, with Northern, Huber sold certain natural gas to Northern which it produced and gathered from 11 wells, insofar as here pertinent, in the West Panhandle field of Texas, and Northern ultimately transmitted and sold that gas in interstate commerce (R. 9a-13a).

Until June 7, 1954, the date of the *Phillips* decision, *supra*, there was no federal regulation of this sale because the Commission had taken the position that such sales were exempt from the Commission's jurisdiction

under Section 1(b) of the Act, which exempted "the production or gathering of natural gas" from the Commission's jurisdiction. Shortly after the *Phillips* decision the Commission issued a series of regulations purporting to govern the rate, certification, abandonment, and other aspects of all sales such as the one here in issue, and in substance purported to freeze such sales as they were on June 7, 1954, unless Commission approval for any change first was obtained (R. 159a).[9]

The Commission regulations had a direct impact on certain aspects of the Huber-Northern contract, which led Huber to believe that it had the right under the contract to terminate the contract. Accordingly, on September 1, 1954, Huber gave Northern the 180-day notice of termination required by the contract (R. 147a-149a).[10]

On September 24, 1954, Huber, as required by the Commission's regulations, filed with the Commission

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[9] Order 174-A was issued on August 6, 1954. Order 174-B, revising Order 174-A, was issued on December 17, 1954. See 19 Federal Register 4535, July 22, 1954; 19 Federal Register 5081, August 12, 1954; 19 Federal Register 6301, September 30, 1954; 19 Federal Register 8809, December 23, 1954; Title 18, Code of Federal Regulations, Sections 154.91-154.102; Sections 157.23-157.29.

[10] The question of the contractual rights of Huber vis-a-vis Northern is not in issue in these proceedings, since, of course, the jurisdiction of the Commission cannot depend on whether or not Huber had a right to terminate the contract, but depends solely upon the terms of the Act. Accordingly, while both the Commission and the Court of Appeals for the Third Circuit commented on these contractual relations, it is respectfully submitted that the comments have no bearing on these proceedings, but that, in the event that this Court determines that the Commission does not have jurisdiction, these issues will be determined either in negotiations or private litigation between Huber and Northern.

(under protest) an application for a certificate of public convenience and necessity covering the sale to Northern, a rate schedule, consisting of its contract, as amended, with Northern, and its notice to Northern of the cancellation of the contract, which the Commission treated as an application to abandon. Northern was permitted to intervene in these proceedings and filed a complaint opposing the cessation of the service. While these proceedings were pending, Huber was enjoined from terminating its sale to Northern pending final Commission determination. *F. P. C.* v. *J. M. Huber Corp.*, 133 F. Supp. 479 (D.N.J., 1955).

The facts developed in the proceedings before the Commission are undisputed. Huber produces and gathers gas from the 11 wells, utilizing an 8-mile gathering system consisting of a pipeline in the form of an arc, with lateral lines to the wells. At a central point in this gathering line there are three valves connected together in the shape of a "T". These valves, like other valves throughout the gathering system, control the flow of the gas. The two valves at the ends of the crossbar of the "T" control the flow of gas from the gathering lines to the north and south respectively. The stem of the "T" consists of two feet of pipe and a valve, into which a Northern pipeline connects, which controls the flow of gas from the entire gathering system. Northern receives the Huber gas at the end of the stem of the "T", measures it, commingles it with gas gathered from several other producers, pipes it through a compressor station near the Huber facilities, then over a number of miles of pipe to a second compressor station, the Skellytown station, where it is commingled with other gas gathered by Northern, all this within the state of Texas. From the

Skellytown station the gas is piped by Northern into interstate commerce (R. 10a-11a).

Huber's production activities on the wells whose output is purchased by Northern are extensively regulated by the Texas Railroad Commission, including regulation of the amount permitted to be produced and delivered each month and annually (R. 62a-69a).

All of the facilities owned and operated by Huber in connection with the sale of gas to Northern, from the well to the point where Huber's and Northern's facilities connect, including those facilities at the point of connection, are classified in the industry from a functional or engineering point of view, as "production" or "gathering" facilities and so denominated. All of Northern's facilities, from this point of connection with Huber's facilities, up to the second or Skellytown compressor station, likewise are known in the industry as "gathering" facilities (R. 62a, 69a, 115a, 116a).[11]

The Commission, in adopting the decision of the Presiding Examiner as its own (R. 29a-30a), concluded, upon this record, that—out of many miles of pipe line and other facilities owned and operated by Huber and producing and gathering gas from the 11 wells—the 3 valves and 2 feet of pipe, located at the point where the Huber and Northern facilities connect, are necessary and useful to the sale to Northern, and therefore subject to the Commission's jurisdiction

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[11] It also appears that Northern's facilities, up to the Skellytown compression station, never have been certificated by the Commission (R. 108a-109a, cf. R. 22a), and the Commission, in other proceedings, appears to have held that such facilities are gathering facilities exempt from Commission jurisdiction. *Matter of Northern Natural Gas Co.* (Opinion No. 230, 1952) (not yet reported).

(R. 17a-19a). Based on its asserted jurisdiction over the 3 valves and 2 feet of pipe, the Commission concluded it had jurisdiction under Section 7(b) over the abandonment of the sale to Northern which Huber had attempted to carry out. (R. 20a). The Commission refused permission to Huber to terminate the sale (R. 24a-26a).

The Commission also issued a certificate of convenience and necessity to Huber covering the sale to Northern. It made no finding that Huber was "willing" to perform the service, as required by Section 7(e), since the record was clear that Huber was unwilling. On the contrary, it concluded that such a finding was unnecessary because Section 7(c) of the Act permitted issuance of such certificates with respect to services in existence on February 7, 1942, without a finding of willingness (R. 15a-16a). The Commission made no reference to the fact that such Section 7(c) certificates are restricted to persons who applied for such certificates within ninety days of February 7, 1942, which Huber did not do (R. 32a-35a).

The Court of Appeals affirmed the Commission's decision, primarily on the ground that, as a matter of law, the *Phillips* decision made the 3 valves and 2 feet of pipe "sales facilities" subject to Commission jurisdiction over abandonment (App. 11a). The Court also held that a certificate could be issued to Huber under Section 7(c), despite the ninety day limitation (App. 9a-11a).

REASONS FOR GRANTING THE WRIT

When the Court, in its 5 to 3 decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 671 (1954), held that the Commission had jurisdiction to regulate the

rates at which independent producers sold gas in interstate commerce for resale, the question immediately arose as to the scope of that regulation by the Commission. The Commission, as noted above, took the *Phillips* decision as a broad charter of authority, and issued omnibus regulations relating not only to rates, but also to other matters, not referred to in the *Phillips* decision, such as abandonment and certification of facilities and services. These regulations, as a practical matter, placed the entire operations of the independent producers under detailed administrative supervision by the Federal Power Commission in addition to the pre-existing regulation by state commissions such as the Texas Railroad Commission.

This resulted, and is resulting, in a multiplicity of litigation in the Commission and the courts concerning the scope of the regulations, and their applicability to specific activities of the independent producers. This case presents important questions which are present, directly, or indirectly, in a large number of these proceedings, and which have not been resolved by this Court.

The Court below and the Commission have chosen to interpret the *Phillips* decision as, in effect, restricting the decision in *F.P.C.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949), to its facts, and as permitting Commission regulation of production and gathering facilities when used in connection with a sale. The scope of Commission regulation of independent producers turns on the propriety of that interpretation. In this context, there are a number of compelling reasons for granting a writ of certiorari in this case.

A. THE QUESTIONS PRESENTED ARE OF MAJOR SIGNIFICANCE IN THAT THE ENTIRE PATTERN OF EXPLORATION, PRODUCTION, GATHERING, AND SALE OF NATURAL GAS, BY "INDEPENDENT PRODUCERS", IS SUBSTANTIALLY AFFECTED BY THE DETERMINATION OF WHETHER THOSE "INDEPENDENT PRODUCERS" MAY TERMINATE SALES OF GAS IN INTERSTATE COMMERCE WITHOUT APPROVAL OF THE COMMISSION.

The natural gas industry is the sixth largest industry in the country measured in terms of capital expenditures and is now believed to be the largest supplier of home fuel, as well as a major supplier of fuel for industrial uses. A major portion of the gas sold in interstate commerce is purchased by the companies operating interstate pipe-lines from independent producers and gatherers. A final determination by this Court of the question of the right of "independent producers" under the Act to abandon an interstate sale is indispensable to the sound development of new gas resources. It is also necessary to their uninhibited commitment of such gas to the interstate market, as well as to the orderly execution and regulation of existing commitments.

A producer of gas may wish to commit gas to a particular sale in interstate commerce for less than the life of the gas field for any number of reasons. He may anticipate need of the gas himself in a few years in some industrial operation.[12] He may anticipate the need of this gas in a few years in some long range venture in the marketing of gas involving the development of other producing wells. He may not have his own gathering or processing facilities immediately available but intend to construct them in the near future. He may

[12] Huber, for example, has a carbon black plant in the vicinity of the gas field here involved and anticipates the need of additional gas for that plant in view of its current expansion. (R. 24a).

simply anticipate a better market for the gas in a few years. If, as is commonly the case, he leases the field, he may have certain obligations to the lessors with respect to disposal of the gas or development of the field. In each of these instances, he may wish to sell the gas which the well may produce immediately, so that he does not lose his current share of the monthly allowables set by the state regulatory commission, and in order to have the income which immediate production would provide.

In this context, the producer should know certain things before he decides when to undertake the exploration of a field, before he drills the well, before he makes any long-range industrial or commercial plans or commitments, and certainly before he commits the gas to interstate commerce. He should know whether he has the right to provide in the contract that the sale may terminate in a given period of time, or under certain specified circumstances. Certainly he should know whether, once he has agreed to sell the gas for transportation in interstate commerce, the Commission has an absolute veto over any termination of the sale and the power to order continuing deliveries until the supply is exhausted.

Similarly, the purchaser of the gas must be able to rely with certainty on this same type of information. The purchaser may seek certain markets, construct different type facilities, make certain types of contracts, or make or not make other commitments with respect to other purchases, depending on the answer.

The Commission also should know the answer to this question in order to effectively carry out its statutory mandate. In approving expansions of service by

pipeline companies it is important for the Commission to know with certainty whether the gas supply relied upon is firm because of the claimed Commission jurisdiction over abandonment, or whether the Commission must take other action to insure continuity of supply. For example, the Commission could require that pipeline companies secure non-terminable contracts for the life of the field as a prerequisite to expanding their services.

The Commission itself has taken the position outside this litigation that jurisdiction over independent producers is neither necessary nor desirable in order to effectively protect the interests of the consuming public.[13] Surely, however, whether it has that jurisdiction or not, it is least effective when the jurisdictional questions are contained in an aura of uncertainty. Under such circumstances, the Commission cannot make the necessary plans for seeking the increased funds and staff necessary to regulate properly the many thousands of independent producers. Neither can it assign its limited staff to resolving such difficult problems as the appropriate basis for measuring the reasonableness of rates charged by independent producers — a matter wholly unresolved although more than two years have elapsed since the *Phillips* decision.

Until this Court has ruled on the basic question presented in these proceedings the many independent producers and gatherers, such as petitioner, and the numerous companies who purchase gas from them, will be unable to take the steps necessary for the

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[13] See Hearings on H.R. 4560, House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess., pp. 11-12 (1955).

orderly development of their businesses, and the channeling and commitment of natural gas into interstate commerce. The Commission itself will be unable to do an effective job of regulation. The natural tendency of producers will be to hold off exploration, or divert known supplies of gas from the regulated interstate market for the indefinite future or, at least, until these issues are resolved. It is patent that the interests of the millions of users of natural gas also will be prejudiced by continuing uncertainty.

B. THERE ALREADY IS A MULTIPLICITY OF LITIGATION INVOLVING COMMISSION JURISDICTION OVER ABANDONMENT OF PRODUCING AND GATHERING FACILITIES AND CLOSELY RELATED QUESTIONS, WHICH LITIGATION WILL INCREASE IN THE ABSENCE OF FINAL DETERMINATION OF THESE QUESTIONS BY THIS COURT, BUT WHICH LITIGATION LARGELY CAN BE SET AT REST BY REVIEW OF THIS CASE.

The decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 671, raised at least as many questions as it answered. In speaking of a multiplicity of litigation, however, petitioner is not speaking of the multiplicity of litigation relating to questions under Section 4 of the Act, such as whether the rates of a particular producer or gatherer in a particular sale in interstate commerce are within the ambit of the *Phillips* decision.

The multiplicity of litigation to which petitioner is addressing itself consists of the numerous pending (and some decided) cases in which questions have been raised under Section 7(b), 7(c), and 7(e) of the Act. These cases consider the jurisdiction of the Commission over a proposed termination of a sale of natural gas in interstate commerce for resale by an independent producer or gatherer who alleges that he does not have facilities subject to Commission jurisdiction.

Also referred to are the cases in which questions have been raised under Section 7(c) and 7(e) of the Act, as to whether the Commission can certificate certain facilities and services of an independent producer and gatherer, where it is alleged that certification is improper because the facilities involved are production or gathering facilities.

In the Court of Appeals for the Fifth Circuit, a number of cases presented these questions in the form of petitions to review the general regulations of the Commission concerning independent producers and gatherers which were promulgated after the *Phillips* decision. The merits of these questions have not been passed upon by the Court on the ground that in the form presented, they were not judicially reviewable at that time. Judge Brown, dissenting, thought the cases were ripe for review, and indicated considerable "doubt concerning the right to forbid or regulate abandonment of sales since the Act relates expressly to service by jurisdictional facilities." *Magnolia Petroleum Co., et al.* v. *F.P.C.*, 236 F. 2d 785, 806 (C.A. 5, 1956); see also *The Texas Co.* v. *F.P.C.*, 236 F. 2d 813 (C.A. 5, 1956); *Gulf Oil Corp. et al* v. *F.P.C.*, 236 F. 2d 812 (C.A. 5, 1956); *Union Oil Company of California* v. *F.P.C.*, 236 F. 2d 816 (C.A. 5, 1956); *Shank* v. *F.P.C.*, 236 F. 2d 830 (C.A. 5, 1956); *Lee* v. *F.P.C.*, 236 F. 2d 835 (C.A. 5, 1956).

There are presently pending before the Court of Appeals for the Fifth Circuit two other cases which directly present the question of the Commission's jurisdiction under Section 7(b), over termination of a sale by independent producers and gatherers. *Magnolia Petroleum Co. et al* v. *F.P.C.*, # 16,092; *Sun Oil Co.* v. *F.P.C.*, # 16,094. For the Commission's de-

cision, see *Matter of Argo Oil Corp. et al.,* 15 F.P.C. 601, 622 (1956).

The question of Commission jurisdiction under Section 7(b) also has been raised in several decided cases before the Commission. *Matter of Skelly Oil Co. and Lone Star Gas Co.* v. *Skelly Oil and Oklahoma Natural Gas Co.,* 15 F.P.C. 1123 (1956); *Matter of Dixie Pipe Line Co. et al,* Opinion No. 285, issued September 9, 1955 (not yet reported), (the *Dixie Pipe Line* case alone involved 19 independent producers).

There also have been approximately 5,000 proceedings before the Commission, where a certificate of convenience and necessity has been granted to an independent producer and gatherer, in which the question has arisen as to which facilities were required to be certificated under Section 7(c) of the Act and which facilities are exempt from Commission jurisdiction because of the producing and gathering exemption contained in Section 1(b) of the Act. In these cases, the question of abandonment jurisdiction under Section 7(b) is indirectly presented. To the extent that there are no facilities within the Commission's jurisdiction, and thus no facilities to be certificated under Section 7(e), the Commission would have no jurisdiction over abandonment if the plain language of Section 7(b) is given effect. Until recently, the Commission has avoided this issue by not specifying which facilities it was certificating, but merely stating that it was certificating all facilities within its jurisdiction. In almost all of these approximately 5,000 instances, Commissioner Digby has stated, in a concurring opinion, as follows:

> "The issue to be resolved is whether the Natural Gas Act requires that a certificate of public convenience and necessity issue for construction

> and operation of the facilities necessary to effect a sale by a producer or gatherer in interstate commerce for resale. The issue is not whether a sale of gas in interstate commerce for resale can be made without facilities. It cannot be doubted that facilities necessary to effect a sale of natural gas in interstate commerce are facilities used in interstate commerce. Recognition of this fact cannot, however, create power in this Commission to issue, much less to require certificates authorizing construction and operation of such facilities."[14]

Undoubtedly this opinion will be filed in the additional thousands of certification proceedings now pending or likely to arise in the next few years.

In a recently decided case, the Commission did attempt to delineate which facilities of an independent producer required certification under Section 7(c) of the Act. It held, in substance, that regardless of whether such facilities were producing or gathering facilities, certification was required if the facilities also "serve the function of effecting the interstate sale or interstate transportation as the case may be." *Matter of Continental Oil Co.*, Opinion No. 293, issued September 20, 1956 (not yet reported). This opinion relied heavily on the decision of the Court of Appeals in the instant case. The opinion demonstrates the close relationship between the questions presented in the instant proceeding and the question presented in the thousands of certification proceedings referred to above concerning which facilities, if any, may be certificated.

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[14] For recent examples of the numerous instances where this opinion has been filed, see *Matter of Saturn Oil and Gas Co., Inc.*, Docket G-5999, Commission Order issued November 9, 1956 (not yet reported); *Matter of the Texas Co.*, Docket G-5717, Commission Order issued November 2, 1956 (not yet reported).

C. THERE ARE CONFLICTS IN PRINCIPLE BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT, BETWEEN THE DECISION BELOW IN THIS CASE AND ANOTHER DECISION OF THE COURT BELOW, AND BETWEEN THE DECISION BELOW AND AN OPINION FILED IN ANOTHER COURT OF APPEALS.

In the *Phillips* case, this Court *held* that the *price* at which an independent producer and gatherer (there, also, a processor) of natural gas sold that gas in interstate commerce for resale was subject to regulation by the Commission. In holding that the producing and gathering exemption was inapplicable to *rate* regulation of such sales, the Court did not purport to hold that the Commission had jurisdiction over the abandonment of sales. Not only was this question not before this Court, but Section 7(b), which governs abandonment, unlike Section 4 which governs rates, specifically limits the Commission's jurisdiction to abandonment of facilities subject to the Commission's jurisdiction or services rendered by means of such facilities—i.e., facilities subject to the Commission's jurisdiction. This Court specifically quoted with approval in the *Phillips* decision from its only abandonment decision under the Act as follows:

> "In Federal Power Co. v. Panhandle Eastern Pipe Line Co., . . . we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural-gas company.'" (347 U.S. at p. 678.)

The *Panhandle* case (337 U.S. 498) specifically held that a transfer of gas leases by an interstate pipeline company, which leases were a vital part of the reserves upon which its interstate transportation and sale of natural gas depended, was not within the Commis-

sion's Section 7(b) jurisdiction over abandonments. This holding was specifically on the ground that such leases were production facilities exempt from Commission jurisdiction by Section 1(b), and, accordingly, there were no facilities subject to the Commission's jurisdiction under Section 7(b).

While the *Phillips* case did not deal with the question of which facilities, if any, were subject to the Commission's jurisdiction, the Court did state that, with respect to Phillips' sales:

> "By the time those sales are consummated, nothing further in the gathering process remains to be done." (347 U.S. at p. 692.)

Using this sentence as the starting point, the Court below in the instant case ruled as follows:

> "The Commission has found that the Huber's T valve system, its valves and the pipe, are facilities which are used to effect the sale of natural gas to Northern . . . The Phillips decision makes such facilities, sales facilities. These are within the Commission's jurisdiction by Section 7(c) of the Act . . . .
>
> "And Section 7(b) of the Act directly prohibits the abandonment of those facilities except by means of the designated procedure which was not followed by Huber." (App. 10a-11a).

This language by the Court below is inconsistent in principle with this Court's *Panhandle* decision, and is a substantial extension of the *Phillips* decision. In the *Panhandle* case, in the words of the dissenting members of this Court, who believed that the Commission there had Section 7(b) jurisdiction:

> "[Panhandle] had its rate base fixed and its ability to serve the public determined on its claim

> of ownership of the very gas reserve properties the Court now permits it to sell to an affiliate over the protest of the Commission. According to the allegations in the Commission's complaint the respondent gas company has already received from its customers large sums of money from rates which reflected expenses incurred in maintaining these reserves and for exploration and development costs in relation to them." (337 U.S. at p. 519, dissenting opinion.)

The majority of the Court, in discussing these matters stated:

> "The argument here is that since natural gas is the 'life blood' of a pipe line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result." (337 U.S. 509.)

Rejecting this argument the Court's opinion went on to comment:

> "The argument begs the question. The section like those above, covers only 'facilities subject to the jurisdiction of the Commission'." (337 U.S. 509.)

Thus in the *Panhandle* case facilities were held exempt from jurisdiction under Section 7(b) even though they were essential to the system of transportation and sale, and even though they were used by Panhandle in its rate base for pricing its sales, and were used as a basis for expanding its transportation system. They were held exempt because they were production facilities. So in the instant case, the facilities involved must be considered exempt, even

though used in and indispensable to the sale, if they are "gathering" facilities.

The decision below conflicts directly in principle not only with the *Panhandle* decision, but also with the decision of this Court in *Connecticut Light and Power Co.* v. *F.P.C.*, 324 U.S. 515 (1945). This Court's decision in that case makes clear that the Commission here cannot attach jurisdiction under Section 7(b) because the Huber production and gathering facilities are used in aid of the sale to Northern. In that case the exemption of "local distribution" facilities under Section 201(b) of the Federal Power Act was involved. The Court said:

> "It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities . . . The (Commission) order must stand or fall on whether this company owned facilities that were used in transmission of interstate power *and which were not facilities used in local distribution.*" (324 U.S. at 531) (emphasis added.)

So here the Commission's jurisdiction must stand or fall on whether the Huber facilities which the Commission claims are used in aid of the sale are or are not production or gathering facilities. To the attempt to rest Commission jurisdiction on the contention that the valve system into which the Northern facilities connect is a "sales" facility, and that Huber's whole producing and gathering operation, upon which the sale to Northern is dependent, may not be abandoned without Commission permission because of the alleged jurisdiction over the valve system, the *Connecticut Light and Power* case presents a short answer. In

speaking of the "local distribution exemption" there in issue, this Court said:

> "To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control." (324 U.S. at 531.)

The Court below and the Commission have misapplied the *Phillips* decision in interpreting it to overrule the principles enunciated in the *Panhandle* and *Connecticut Light and Power* cases. An order to sell and deliver the gas is, for all practical purposes, an order to produce and gather it. While it is possible to make a technical distinction between the instant case and the *Panhandle* and *Connecticut Light and Power* cases, if those decisions have any real vitality remaining, the decision below conflicts with them.

The decision below also is inconsistent in principle with an earlier decision of the Court of Appeals for the Third Circuit which antedated the *Phillips* decision. In *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 204 F. 2d 675, 680 (C.A. 3, 1953) a Federal Power Commission order, much more remote from production and gathering than the order involved here, was reversed by the Court in part because deemed to constitute a regulation of production and gathering. See also the opinion of Judge Brown, dissenting in *Magnolia Petroleum Co.* v. *F.P.C.*, 236 F. 2d 785, 806 (C.A. 5, 1956).

D. THE DECISION BELOW IS ERRONEOUS.

1. The Commission Has No Statutory Authority to Prevent Termination of the Sale by Huber to Northern Because Section 7(b) of the Act Limits Its Authority Over Abandonment to Facilities or Services Rendered by Means of Facilities Within the Commission's Jurisdiction and Huber's Facilities All Are Production or Gathering Facilities Exempt From Commission Jurisdiction by Section 1(b) of the Act.

Huber does not dispute the factual conclusion of the Commission and the Court below that out of its extensive producing and gathering equipment 3 valves and 2 feet of pipe are used in and necessary to the sale. Huber would go further and contend that all of its equipment from the wells to the point of connection with the Northern facilities is useful and necessary to the sale. The Commission recently has recognized this point. Holding that it makes no difference whether a facility also serves a producing, gathering, or some other function, the Commission has labeled as "sales" facilities those facilities which are most useful to and most immediately effect the sale. *Matter of Continental Oil Co.*, Opinion No. 293, issued September 20, 1956 (not yet reported). As this Court pointed out in the *Panhandle* case, *supra*, however, this begs the question of whether the Commission has jurisdiction under Section 7(b). This question of jurisdiction turns on whether all these facilities also are producing and gathering facilities excluded from Commission jurisdiction by Section 1(b) of the Act.

Both the Court below and the Commission rested their decisions on the *Phillips* decision. A careful reading of the *Phillips* decision nowhere discloses any intimation that the use of a part of a producing or gathering system to facilitate a sale in interstate com-

merce subjects the facilities and service to Commission jurisdiction over abandonment under Section 7 (b).

The Commission's abandonment jurisdiction under Section 7(b) is not as broad in scope as its rate jurisdiction under Section 4. The language conferring jurisdiction in Section 7(b) contains limitations not present in Section 4. Before Commission jurisdiction over abandonment of a particular service may attach, it must first be found that the service is rendered by "facilities subject to the jurisdiction of the Commission."

Applying Sections 1(b) and 7(b) to the undisputed facts in this case, it is clear that there are no jurisdictional facilities and that the Commission does not have jurisdiction over the abandonment in issue. The undisputed evidence is that all the Huber facilities are known in the industry under a "functional" or "engineering" classification, as production or gathering facilities. (R. 62a, 69a, 115a, 116a). The conclusion reached below, that as a matter of law they are "sales" facilities (App. 11a), emasculates the limitations which Congress, by Sections 1(b) and 7(b), has placed upon the Commission's jurisdiction.

There can be no doubt that the decision of the Court below and of the Commission results in classification of some facilities of every producer or gatherer who sells gas in interstate commerce for resale as "sales" facilities subject to the Commission's jurisdiction. See also *Matter of Continental Oil Co.*, Opinion No. 293, *supra*. To assume that, wherever there is a sale, the seller has "sales" facilities, thus making abandonment of the deliveries made on such facilities subject to the Commission's jurisdiction under Section 7(b), not only

is to ignore the producing and gathering exemption of Section 1(b), but is to strip the facilities requirement of Section 7(b) of any real meaning. The net result is that the producing and gathering exemption is inapplicable in almost every instance where the Commission otherwise would have jurisdiction, and in essence this exemption is deleted from the Act. Similarly, the assumption that there always are jurisdictional facilities where there are sales, renders the facilities requirement a nullity.

It may be contended that the reference to facilities subject to the jurisdiction of the Commission in Section 7(b) is controlled and clarified by the requirement in Section 7(c) of a certificate of public convenience and necessity for the construction and operation of facilities used in the "transportation or sale of natural gas subject to the jurisdiction of the Commission." This argument also begs the question of the application of the "producing or gathering" exemption in Section 1(b).

To indulge the inference that the language of Section 7(c) referred to makes all facilities used or useful in connection with sales of natural gas in interstate commerce subject to the jurisdiction of the Commission under Section 7(b) without reference to the exemption in Section 1(b) would ignore the history of the legislative action. As the Court below pointed out in its opinion:

> "The jurisdictional sections of the act, 1(b) and 7(b) obviously do not rely upon the certificate provisions of 7(c). The pertinent amendments to the latter did not come into existence until almost four years after Section 1(b) and 7(b) had been enacted". (App. 14a).

The Commission also concluded that the scope of Section 7(b) is not affected by Sections 7(c) and 7(e). (R. 21a-22a). At the time this amendment was added the Commission had ruled that sales such as are here involved were exempt from all Commission regulation due to the producing and gathering exemption.[15] Further, there is no suggestion in the legislative history of the 1942 amendment that the change was being sought or was intended to expand the jurisdiction of the Commission over producing or gathering facilities.

Under these circumstances, all that can be drawn from Section 7(c) is that the Commission shall require a natural gas company to make application for a certificate of convenience and necessity covering the transportation or sale of gas in interstate commerce and also covering whatever facilities "therefor" properly are subject to the jurisdiction of the Commission in the light of the grant of jurisdiction and the exemptions therefrom contained in Section 1(b). It does not determine that all facilities used or useful in connection with the sale are so subject to the jurisdiction of the Commission without reference to the producing and gathering exemption in Section 1(b).

The same rule which holds true at the beginning of interstate transmission also must hold true at the end, and presumably the facilities of a local distributing company which attached to a pipeline company's facilities, under the decision below now would be known as "sales" facilities, for they equally facilitate

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[15] *Matter of Columbian Fuel Corp.*, 2 F.P.C 200 (1940); *Matter of Billings Gas Co.*, 2 F.P.C. 288 (1940).

the sale at that end.[16] Thus the Commission would extend its regulation to local distribution, which Section 1(b) also exempts.

The Act may be interpreted with consistency, and without ignoring either the plain language or history of Sections 1(b), 7(b) and 7(c), by recognizing that the reference to "facilities" both in Section 7(b) and Section 7(c) was not intended to encompass facilities which essentially were part of the producing and gathering or local distribution systems, even though those facilities might also be useful or essential to the execution of a sale. As noted above, in *Connecticut Light and Power Co.* v. *F. P. C., supra,* this Court rejected a Commission attempt to assert jurisdiction under the Federal Power Act, where the circumstances and Commission reasoning were closely analogous to the situation here before the Court.

An examination of the cases prior to both the *Panhandle* and the *Phillips* decisions, where there was occasion to construe the "production or gathering" exemption, serves only to underline the foregoing analysis. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612-13 (1944); *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581, 602-03 (1945); *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690 (1947). In each of these cases the "production and gathering" exemption was considered in relation to rate making or

[16] In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 504-05 (1949) this Court specifically rejected a Commission argument that the producing and gathering exemption of Section 1(b) was narrower than the local distribution exemption in terms of the application of those exemptions to "facilities" therefor.

price fixing. This Court drew the distinction in each instance between rate regulation which was delegated to the Commission, and regulation of the full activity of producing or gathering natural gas over which the Commission was given no authority.

2. The Act Requires That Huber Terminate Its Sale to Northern Because Section 7(c) Makes Such a Sale Unlawful Unless Certificated by the Commission, and the Commission is Precluded by the Requirements of Sections 7(c) and 7(e) From Issuing a Certificate of Convenience and Necessity to Huber.

The terms of Section 7(c) make the following points clear:

a. No sale of natural gas within the Commission's jurisdiction may be made unless the Commission first issues a certificate of convenience and necessity.[17]

b. A certificate must be issued without further proof of public convenience and necessity with respect to sales and services in existence on February 7, 1942, "if application for such certificate is made to the Commission within ninety days after February 7, 1942."

c. "In all other instances . . . the application shall be decided in accordance with the procedure provided in subsection (e) [Section 7(e)] . . . and such certificate shall be issued or denied accordingly. . . . "

Section 7(e) is equally explicit. It provides the following:

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[17] See also *House Report No. 1290*, 77th Cong., 1st Session, p. 2 (1941); *Senate Report No. 948*, 77th Cong., 2nd Session, p. 1 (1942); *Matter of Panhandle Eastern Pipeline Co.*, Opinion No. 274 (1954) (not yet reported); *Matter of Mississippi River Fuel Corp.*, 9 F.P.C. 198, 204 (1950); *Cf. U. S.* v. *Rockplant Motor Transit Co.*, 340 U.S. 419 (1951).

a. It is applicable except "in the cases governed by the provisions in subsection (c) [Section 7(c)] . . .".

b. A certificate may be issued to any qualified applicant only if the Commission finds that the applicant is willing and able to provide the service and conform to the applicable law and regulations and that the present or future public convenience and necessity requires the sale or service.

There is no dispute that Huber was rendering the service and making the sale here in issue on February 7, 1942, and further that Huber did not apply for a certificate of convenience and necessity until September 24, 1954 (and applied even then only under protest) (R. 7a, 32a-35a), long after the ninety days referred to in Section 7(c) had expired. Further, it is undisputed that Huber has asserted that it is unwilling to render the service or to comply with the applicable laws and regulations, that its application for a certificate was filed under protest, and that Huber sought to withdraw that application. (R. 7a-8a, 15a, 43a-46a)

The Commission has not found Huber to be "willing" to perform the service, nor has the Commission found the service to be required by the public convenience or necessity, although it has found that public convenience and necessity do not permit the abandonment of the sale (R. 27a). Neither the Commission nor the Court below takes issue with Huber's contention that such findings are prerequisite to issuance of a certificate under Section 7(e) and cannot be made in this case. Instead, the Commission and the Court below rely on Section 7(c) as the basis for issuance of a certificate without the necessity of such findings, holding Section 7(e) inapplicable. (App. 12a-14a; R. 16a).

The rationale of these decisions is based upon the fact that the Commission did not assert its jurisdiction over such sales until after the *Phillips* decision on June 7, 1954. Accordingly, the Commission and the Court below reasoned that the ninety day proviso of Section 7(c) somehow is extended until some unspecified time, and with respect to services in existence on February 7, 1942, which are within the ambit of the *Phillips* case, a certificate may issue under Section 7(c).

This conclusion amounts to amendment of Section 7(c), deleting the ninety day requirement and substituting a proviso to the effect that, wherever the Commission misinterpreted the Act, the time for issuance of a certificate, without making any of the requisite findings, shall be extended for some indefinite period after a decision of this Court corrects the matter. This is contrary to the Commission's own regulations which provide, without qualification, for a cut-off date under Section 7(c) of May 8, 1942. See 18 C.F.R. Section 157.1. The few pertinent authorities found also suggest the opposite result. See *In the Matter of Southern Natural Gas Co.*, 3 FPC 436, 439 (1943); *Grove* v. *U. S.*, 40 F. Supp. 503, 504-05 (D. Pa., 1941).

If, as Huber contends, the Commission may not, under the facts of this case issue a certificate of convenience and necessity, then a continuation of its sale to Northern is made unlawful by Section 7(c). While Sections 7(c) and 7(e), insofar as here pertinent, were added after Section 1(b) and 7(b) had been enacted, and are not decisive as to the intended meaning of

Sections 1(b) and 7(b),[18] certainly when possible the Act should be interpreted to be consistent. That consistency is found, without ignoring some language, and amending other terms of the Act, only if Huber's proposed abandonment is found to be beyond the Commission's jurisdiction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY H. FOWLER
1701 K St., N. W.
Washington 6, D. C.

Counsel for Petitioner,
J. M. Huber Corporation

Of Counsel:

MARX LEVA
ROBERT MARTIN
FOWLER, LEVA, HAWES & SYMINGTON
1701 K St., N. W.
Washington 6, D. C.

SPENCER W. PITTS
Red Bank, N. J.

THOMAS O. MOXCEY
Borger, Texas

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[18] In a very recent decision the Court of Appeals for the 10th Circuit held the converse, that Section 7(b) did not limit the Commission's power under Sections 7(c) and 7(e). The issues there, however, pertained solely to whether a willing applicant could obtain a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *F. P. C.*, (C.A. 10, October 29, 1956) (not yet reported).

APPENDIX A

Statutes Involved

Section 1(b) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717(b), (52 Stat. 821) provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Section 7(b) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717f(b), (52 Stat. 824), provides:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Section 7(c) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717f(c), (52 Stat. 824, 56 Stat. 83) provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any

proposed construction or extension shall engage in the transportation or sale of natural-gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations

for which the issuance of a certificate will not be required in the public interest."

Section 7(e) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717f(e), (52 Stat. 824, 56 Stat. 83) provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder and that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,799

J. M. HUBER CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued June 18, 1956

Before MARIS and MCLAUGHLIN, *Circuit Judges*, and VAN DUSEN, *District Judge*.

Opinion of the Court

(Filed August 31, 1956)

By MCLAUGHLIN, *Circuit Judge*.

Petitioner, a New Jersey corporation, produces and gathers natural gas from twelve fields in Carson County, Texas, part of the West Panhandle Field. Gas from eleven of the fields flows into a T shaped control system of three valves. The stem of the "T" consists of two feet of pipe and a valve with which intervenor Northern's pipeline connects. Since April 21, 1936, Huber has been selling gas

from those fields under a contract, (as amended) to Northern at the connecting delivery point at well head pressures. Northern transports the gas to its main line transmission facilities where it continues on in interstate commerce transmission until delivered for consumption to ultimate customers or is sold for resale to ultimate customers. The contract is for the life of petitioner's leasehold interests in the producing acreage and as long as gas is taken from it in paying quantities. The remaining time under the contract terms is estimated at approximately ten years.

On June 7, 1954, the Supreme Court in Phillips Petroleum Co. v. Wisconsin, et al., 347 U.S. 672, held that an independent natural gas producer who, though not engaged in the interstate transmission of gas from the producing fields to consumer markets, does sell to interstate pipeline transmission companies which transport and resell the gas to consumers and local distributing companies in various states, is a "natural gas company" within the meaning of the Natural Gas Act, 15 U.S.C. Sec. 717 et seq. As a result, the Commission prescribed regulations covering such companies. Petitioner, under protest, complying with these, filed an application for a certificate of public convenience and necessity under Section 7(a) of the Act covering its sales to Northern. It also filed its contract with Northern as a rate schedule under Section 4(c), together with a notice to Northern of cancellation of that agreement. The ground for cancellation alleged that the Commission has established a price for Huber's gas less than the contract price with Northern which permitted Huber to invoke the escape clause in the agreement.[1] The Commission rejected

[1] The agreement between Huber and Northern allowed the former to add to the purchase price of the gas any Texas production tax. It also gave Huber the right to cancel if a government regulatory body establishes a purchase price less than that of the contract. The Texas production tax was increased on September 1, 1954. Huber claimed that Commission Order 174-A prevented it from

the notice " * * * in so far as it purports to effect an abandonment of a sale or service subject to the jurisdiction of the Commission without express permission and approval first had and obtained as required by Section (7) of the Natural Gas Act * * *." Prior to the hearing Huber filed a "Withdrawal" of its application for the certificate which stated that if this is not allowed it wished to amend its application, setting out that it is "not willing to do the acts and perform the service proposed and is not willing to conform to the provisions of Section 7(e) of the Natural Gas Act and the requirements, rules and regulations of the Federal Power Commission thereunder, and under the provisions of said Section 7(e) of the Natural Gas Act it is mandatory that the Federal Power Commission deny this application for certificate. J. M. Huber Corporation is not willing to accept a certificate covering the sale previously described herein with or without conditions appended to the issuance thereof. Huber is willing eo instante, upon denial of this application by the Commission, to cease delivering natural gas to Northern Natural Gas Company." Following completion of the hearings Huber filed a withdrawal of its notice of cancellation of the rate schedule based on its Northern contract. It stated that it was taking this action because it had erroneously assumed its sale to Northern was within the jurisdiction of the Commission.

Prior to any decision in the matter Huber advised the Commission it was terminating deliveries to Northern

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receiving the amount of the increase from Northern and the latter from paying it. Acting on that theory Huber served Northern with a notice of cancellation, effective March 1, 1955.

The claim is without merit. The Commission has never reduced the price of the gas below the terms of the contract. Huber has simply refused to follow the mechanics of obtaining Commission approval to add the increased state tax to the Northern purchase price. See Section 154.94 of the Regulations of the Commission adopted under its Order 174-A. It is not denied that without exception, the Commission has granted all rate-increase proposals by independent producers which were based on increased Texas-gross-production tax payments.

March 10, 1955. The Commission obtained a temporary restraining order against the threatened move in the United States District Court, District of New Jersey and thereafter in that suit Huber was enjoined from discontinuing its sales for resale to Northern pending final Commission decision in the present issue.[2] Appeal from that decision is pending before us.

The decision of the Presiding Examiner in this cause was filed June 14, 1955. It held that on February 7, 1942 Huber was engaged in the sale of natural gas subject to the jurisdiction of the Commission over the routes described in its application for a certificate of public convenience and necessity and exhibits attached thereto, and has so operated since that time; that the sale of gas from the eleven wells is made in interstate commerce and subject to the jurisdiction of the Commission; that the T valve and pipe system above referred to are necessary Huber facilities for the sale of the gas from the said wells; that the sale together with the operation of the said facilities is subject to Section 7(c) of the Act and of Part 157 of the Commission's regulations; that the Huber gas supply underlying the eleven wells acreage is not so depleted as to render unwarranted further sales by means of the referred to facilities and that neither present nor future public convenience and necessity permits the abandonment by Huber of said facilities or the sale rendered by means of such facilities.

By an appropriate order (subject to review by the Commission), filed at the same time, a certificate of public convenience and necessity was issued to Huber and its application to abandon its sale of natural gas to Northern was denied, except as it related to the twelfth well which is not material to this litigation. Permission to abandon the T system facilities was also refused. On October 6, 1955 the Commission affirmed the decision in its entirety. An order

[2] 133 F.Supp. 479, 488 (D.C.D.N.J. August 16, 1955).

denying the application for rehearing was issued November 29, 1955. The petition for review was thereafter filed.

The Phillips decision makes it very clear that Huber is a natural gas company directly within the jurisdiction of the Commission under the Act by reason of its sale of natural gas to Northern, admittedly a sale in interstate commerce of natural gas for resale. Huber would seem to accede to the jurisdictional view for its attempt to cancel the Northern contract, as has been noted, was based upon the Commission's action in its 174-A order which Huber claimed established a price for the contract gas less than the amount fixed by the contract itself. In so doing, Huber recognized the right of the Commission to control the price of the gas. That the cancellation maneuver was not justified and for its own purposes in no way detracts from Huber's plain acceptance of the authority of the Commission. Irrespective of that, in almost identical circumstances the Supreme Court held Phillips, just such an independent natural gas producer, to be a "natural gas company" within the Act and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of, and rate regulation by the Commission. In that action as here the contention was made that the sales by Phillips were apart of the "production or gathering of natural gas" and controlled by the second clause of Section 1(b) of the Act which provides that the authority of the Commission does not extend "to the production or gathering of natural gas." The Commission had found that the sales by Phillips were part of the production and gathering process or at least an exempt incident thereof but the Supreme Court at page 678 flatly rejected that position saying:

> "We are of the opinion, however, that the finding is without adequate basis in law and that production and gathering, in the sense that those terms are used in § 1(b) end before the sales by Phillips occur."

The first clause of Section 1(b) of the Act establishes its application "to the transportation of natural gas in interstate commerce to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use and to natural-gas companies engaged in such transportation or sale * * *." And the Supreme Court said in Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 690-691 (1947) regarding the jurisdiction thus conferred that "Exceptions to the primary grant of jurisdiction in the section are to be strictly construed." The assertion that the sale to Northern is part of Huber's gathering process and consequently not controlled by the Commission is almost identical with the unsuccessful argument urged in that cause by Interstate.

The suggestion that the legislative history shows that Congress intended to regulate only the interstate pipelines and that the Northern sale should be construed as an integral part of Huber's business of producing and gathering was also advanced in Phillips. The Court significantly and sweepingly disposed of that thought by saying:

> "Rather, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company."

And at page 685 the Court laid down the general guiding principle with reference to the type of sale by an independent producer with which we are dealing in this petition. The court said:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation

> of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. Federal Power Commission v. Hope Natural Gas Co., supra, at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

Though admitting that its T valve system facilities are used in its sale to Northern and that there can be no sale unless the seller's and the buyer's facilities connect, Huber seeks to derive some support for the theory that its valves and pipe segment are gathering facilities from the Interstate opinion, supra, but that decision specifically stated at page 691, "It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may be in some degree affected." There, the producer petitioner, like Huber, insisted its sales were a portion of the gathering operation. The court found it unnecessary to resolve the question of just where the gathering process concluded, whether at the place of sale or at some point prior to surrender of custody and passage of title. It held, page 692 simply and effectively that "By the time the sales are consummated, nothing further in the gathering process remains to be done."[3]

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[3] Two other decisions cited by petitioner do not affect the instant issue. Connecticut Light and Power Co. v. Federal Power Commission, 324 U.S. 515 (1945) involved local distribution and Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949) concerned the sale of gas leaseholds.

The Commission has found that the Huber's T valve system, its valves and the pipe, are facilities which are used to effect the sale of natural gas to Northern. This is a fact finding supported not only by substantial evidence on the whole case but, if not accepted by Huber, certainly not credibly contradicted. The Phillips decision makes such facilities, sales facilities. These are within the Commission's jurisdiction by Section 7(c) of the Act which reads:

> "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:"

And Section 7(b) of the Act directly prohibits the abandonment of those facilities except by means of the designated procedure which was not followed by Huber. The section reads:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

For all of the above reasons, the Commission in its order of October 6, 1955 denying Huber's application to

abandon its Northern contract, was within its jurisdiction under the Act.

While the above disposes of the basic problem in this appeal there are several minor points that should be passed upon.

Huber attacks the certificate allowed it under Section 7(c), maintaining that since it did not apply for the certificate within ninety days of February 7, 1942, the effective date of the amendment to Section 7(c), as called for by that amendment, there was no authority in the Commission to allow it.

We are satisfied the certificate was properly issued. The 1942 amendment to Section 7(c) prohibited all gas companies from engaging in the transportation or sale of natural gas subject to the jurisdiction of the Commission "unless there is in force with respect to such natural gas companies a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." The amendment further provided in its "grandfather clause" that as to companies so engaged on the effective date of the amendment the Commission would issue certificates for the particular route or routes without further proof of public convenience and necessity if applied for within ninety days after the effective date of the amendatory Act. But it was not until after the Phillips decision in 1954, and by reason thereof, that the Commission declared its jurisdiction over independent natural gas producers similar to Huber and by amendments to its Rules and Regulations required them on and after June 7, 1954 to obtain certificates covering transportation and sale of natural gas under the jurisdiction of the Commission. Following that Huber, on September 24, 1954, filed its application covering its sale to Northern.

The jurisdiction of the Commission over a natural gas company conferred by Section 4(b) of the Act does not

depend on whether that company fulfills its obligation under 7(c) to obtain a certificate. There is nothing in 7(c) or any other part of the Act giving the slightest credence to that strange conception of the Commission's authority. On the contrary by Section 16 of the Act "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act." Huber was selling to Northern on February 7, 1942 and continued to do so through 1954 and down to and including the present time. As it now develops, jurisdiction by the Commission over independent producers was present in the Act throughout the period but it was not until the Supreme Court defined it in 1954 that the Commission considered itself justified in asserting that authority. There is no indication that its attitude prior to the Phillips decision was arbitrary or capricious and beyond doubt thereafter it functioned in accordance with the Supreme Court mandate. In the circumstances issuance of the application under Section 7(c) was within its authority. Petitioner's suggestion therefore that Section 7(e)[4] was the pertinent section under which to consider its application need not be examined at length. It is

[4] Section 7(e) reads:

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

sufficient to say that 7(e) on its face relates to new service and not to that in effect on February 7, 1942, the date of the amendment to Section 7(e). Irrespective of Section 7(e), under the law and facts petitioner's unwillingness to accept its certificate offers no real problem. The jurisdictional sections of the Act, 1(b) and 7(b) obviously do not rely upon the certificate provisions of 7(e). The pertinent amendments to the latter did not come into existence until almost four years after Sections 1(b) and 7(b) had been enacted. In Section 7(e) as amended there is nothing about the need of a gas company accepting a certificate. As we see it, with the certificate properly issued, Huber's attempted defiance of the Commission's rightful exercise of its authority is of no importance.

As part of its main theme that the T system is a gathering facility, petitioner states it is so considered in the industry. The basis for this is the testimony of R. C. Lister who made it plain that he was not attempting any legal characterization. The true test is the use and service of the valves and pipe.

Huber also makes some point of Northern being uncertificated with the view of distinguishing the facts from the Phillips situation. Whether Northern did obtain a certificate for its facilities beyond Huber's delivery place depends upon the interpretation of a Commission order which issued a certificate to Northern under Section 7(c) of the Act, 3 F.P.C. 767. The Presiding Examiner rightly determined that he for the Commission need not pass on that question in this proceeding. Even assuming absence of the particular certification, that is, as he stated, "* * * no legitimate ground for the Commission permitting Huber to abandon its sale to Northern."

Finally, petitioner attacks the power of the Commission under Section 7(b) to prevent it abandoning the Northern agreement as contrary to the Fifth Amendment.

It bases this on the statement that it is unwilling to undertake the obligations of a regulated natural gas company in connection with its production, gathering and disposition of gas from the leases involved.

In the light of the Phillips opinion the argument comes too late. It is now firmly settled that petitioner's business includes the sale of natural gas in interstate commerce for resale and so is controlled by the Commission. Section 1(a) which is the Act's declaration of policy leaves no doubt that such selling is within its scope. It reads:

> "As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

There is nothing in the record of argument to weaken the conclusion that selling natural gas for ultimate distribution to the public is affected with a public interest which makes federal regulation necessary.[5] Nor is there any sound indication that said business of Huber is not thus affected. Beyond question Congress has the power to regulate interstate commerce in natural gas.[6] And we are completely convinced that this includes authority to regulate

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[5] See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 582 (1942).

[6] Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581 (1945); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944); Federal Power Commission v. Natural Gas Pipeline Co., supra.

abandonment of sales and of the facilities for sales. We think the sense of the Phillips decision is altogether opposed to permitting the Commission's control of sales to be nullified by the independent producer's abandonment of those sales at will. The money losses to distribution lines and to the ultimate consumers would be stupendous in actual equipment, etc., but a far greater loss would be the deprivation of the vital gas itself to the public. Eventually some sort of substituted service might be brought in at further cost and it in turn, because of opportunity for greater profit or the whim of the producer, might later abandon its sales. The resultant conditions need not be labored. The Commission under Section 1(a) above quoted has no greater duty than to prevent them.

Huber voluntarily entered into its contract with Northern. Though that agreement was prior to the statute, control legislation, including the abandonment clause, had been introduced the previous year.[7] The jurisdictional escape clause of the agreement strongly implies that the parties were alert to possible future express regulation.[8] In addition, and most important, service to the public was the foundation of the contract operation. That service was given. The public has relied on it through the years and is entitled to its fair continuance. To abandon it there must be Commission approval.

Apparently Huber could obtain more for its gas elsewhere. Whether it could or not the Commission will not force it to supply Northern at a confiscatory price. Actually there is a current proceeding before the Commission the purpose of which, as categorically stated for the Com-

[7] H.R. 5423, 74th Congress, introduced Feb. 6, 1935, Section 305(b).

[8] In Nebbia v. New York, 291 U.S. 502, 534 (1934), the Supreme Court said: "* * * if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

mission, is to deal fully and justly with petitioner's and Northern's rate problem.

The order of the Federal Power Commission will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,799

J. M. HUBER CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent

Present: MARIS and MCLAUGHLIN, *Circuit Judges,* and VAN DUSEN, *District Judge.*

Judgment

This cause came on to be heard on the transcript of record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of October 6, 1955 of the Federal Power Commission in this case be, and the same is hereby affirmed.

Attest:
HARRIET G. HUMPHREYS
Deputy Clerk

August 31, 1956

Received & Filed Aug. 31, 1956 IDA O. CRESKOFF, *Clerk*

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 600

J. M. HUBER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 4a–17a) is reported at 236 F. 2d 550. The decision of the Presiding Examiner, affirmed by the Commission (R. 29a–30a), is set out at R. 6a–29a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1956 (Pet. App. 18a). The petition for a writ of certiorari was filed on November 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTIONS PRESENTED

Petitioner, an independent natural gas producer, has been selling natural gas to Northern Natural Gas Company for resale to ultimate consumers in interstate commerce; these sales to Northern are admittedly subject to Federal Power Commission regulation. Part of petitioners' facilities used in making these sales were found by the Commission and the court below to have use only in connection with the sale and delivery of the gas to Northern. The questions presented are:

1. Whether Section 7 (b) of the Natural Gas Act applies to petitioner's proposed abandonment of these sales of natural gas to Northern.

2. Whether, in view of petitioner's unwillingness to continue the sales, the Commission properly issued a certificate of public convenience and necessity under Section 7 of the Act for petitioner's sales of gas to Northern which it has been making since before 1942.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set out in the Appendix to the petition at pages 1a–3a.

STATEMENT

By petition filed in the United States Court of Appeals for the Third Circuit, petitioner sought review of an order of the Federal Power Commission (1) refusing to authorize petitioner to abandon, under Section 7 (b) of the Natural Gas Act, sales of natural gas made by it to Northern Natural Gas Company

and (2) issuing a certificate of public convenience and necessity for such sales. The Court of Appeals affirmed (Pet. App. 4a–17a). The relevant facts may be summarized as follows:

Background.—Following this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, holding that the "wholesales of natural gas in interstate commerce" (*id.* at 682) are subject to regulation under the Natural Gas Act, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by this Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A, which superseded Order No. 174, but made no substantial change in the provisions here involved (19 F. R. 5081).

Order No. 174–A adopted substantially the language of the *Phillips* decision in defining the class of independent producers of natural gas subject to the Act as including those natural gas companies "engaged in the production or gathering of natural gas and who transport[s] natural gas in interstate commerce or sell[s] natural gas in interstate commerce for resale * * *" (347 U. S. at 683, 684; 19 F. R. 5081). The order did not purport to determine which of the over 4,000 independent producers were subject to regulation under the Act but left such determinations to individual hearings. The order required producers subject to the Act to file with the Commission, by

October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service (19 F. R. 5081). When a large number of natural gas producers filed motions for rehearing and a stay of Order No. 174–A, the Commission denied all the requests for stays but called for briefs and suggestions as to revision of the order and granted oral argument on the motions (R. 159a–160a). Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (R. 160a). On December 17, 1954, the Commission amended and reissued Order No. 174–A as Order No. 174–B, and denied all applications for rehearing.[1]

The Present Case.—Petitioner, an independent producer of natural gas, has since 1936 sold and delivered natural gas produced by it to the Northern Natural Gas Company under a contract which was to continue in force for the term of petitioner's leasehold interest in its producing acreage and so long as gas is produced in paying quantities (R. 133a–146a).[2] The gas delivered under this contract is produced from 11 wells owned and operated by petitioner and transported at well-head pressure through its field pipeline system, which consists of two branches leading to a central delivery point where it passes through

[1] Excerpts from the provisions of Order No. 174–B, which for practical purposes is identical with No. 174–A, are set forth at pp. 159a–168a of petitioner's appendix in the court below.

[2] The remaining time is estimated as approximately ten years (R. 9a–10a).

a so-called "T" system into lines owned by Northern (Pet. App. 4a–5a).[3] Northern compresses the gas and then passes it to its main line transmission facilities where it continues in interstate commerce to the points of delivery for consumption by the ultimate consumers. The flow of gas from petitioner's wells to Northern's main transmission line is continuous and uninterrupted (R. 9a–13a).

In compliance with the Commission's regulations, petitioner, on September 24, 1954, filed, under protest, an application for a certificate of public convenience and necessity covering its Northern sales (R. 32a). On the same date, it also filed its Northern contract (as amended) as an initial rate schedule, pursuant to Section 4 (c) of the Act (R. 133a–146a). In addition, it simultaneously filed a "notice of cancellation" of the Northern rate schedule, requesting that the Commission "grant express permission and approval to the cancellation and abandonment of [the Northern] sale on March 1, 1955, pursuant to the terms and provisions" of the Northern contract (R. 150a–151a).

As justification for this proposed abandonment, petitioner relied upon a provision in its Northern contract permitting petitioner "at its election to cancel this agreement" in the event "any court or government regulatory body or agency having jurisdiction shall lawfully establish a price to be paid by Buyer for gas purchased from Seller hereunder different from that

[3] The "T" system which forms the point of connection between petitioner's and Northern's systems consists of two feet of stub pipe, connections, and to which are attached three valves which control the flow of gas from the two branches of petitioner's gathering system into Northern's transmission line (R. 10a, 157a).

fixed herein" (R. 143a–144a). Petitioner pointed out that Order No. 174–A required, pursuant to Section 4 (d) of the Act, that rate increases on jurisdictional sales could be made effective only after filing and approval by the Commission. Since petitioner had failed to apply for a rate increase to which it was entitled under its contract (based upon an increase in the Texas production tax on its sales) and hence could not put this increase into effect, petitioner argued that the Commission's regulations had established a price different from that provided for in the contract, and that accordingly it was entitled to cancel the contract[1] (R. 148a).

The Commission rejected petitioner's notice of cancellation "* * * insofar as it purports to effect an abandonment of a sale or service subject to the jurisdiction of the Commission without express permission and approval first had and obtained as required by Section (7) of the Natural Gas Act * * *" (R. 41a). The Commission, however, set the matter for hearing together with petitioner's original certificate application and Northern's complaint that the proposed abandonment would be contrary to the public interest (R. 41a–42a; see also R. 50a–53a).

Meanwhile, before these hearings were had, petitioner, on January 12, 1955, attempted to withdraw its application for a certificate of public convenience and necessity "to the extent that it may lawfully do so * * * and * * * to the extent that it is so permitted * * *" (R. 43a–44a). Alternatively, petitioner

[1] Without exception, the Commission has granted all applications for rate increases based on the increase in the Texas production tax (Pet. App. 6a).

undertook to amend the certificate application to state that it was filed under duress and that petitioner "is not willing to do the acts and perform the service proposed and is not willing to conform to the provisions [of Section 7 (e)] of the Natural Gas Act and the requirements, rules and regulations of the Federal Power Commission thereunder * * *" (R. 44a).[5]

Hearings and argument were then had, following which the Presiding Examiner issued his proposed decision (R. 6a–29a).[6] The Examiner held that petitioner's sales of natural gas to Northern since before February 7, 1942, constituted sales for resale in interstate commerce, subject to regulation under the Natural Gas Act (R. 13a, 26a, 27a); that the abandonment of these sales was subject to Section 7 (b) of the Act (R. 16a–22a, 27a); and that petitioner had not established that public convenience or necessity justified the abandonment of these sales (R. 25a–26a, 27a). He rejected petitioner's argument that the facilities used to make the Northern sales were also production and

[5] Following the hearings, petitioner also requested to be allowed to withdraw its "notice of cancellation" of its Northern rate schedule on the ground that it was not subject to the Commission's jurisdiction (R. 47a).

[6] After the hearings were completed, but before the Presiding Examiner had issued his decision, petitioner notified the Commission that it intended to stop deliveries to Northern on March 10, 1955 (Pet. App. 6a, 7a). The Commission thereupon sought and obtained in the United States District Court for the District of New Jersey a permanent injunction against petitioner's terminating its Northern service until completion of the administrative proceedings. *Federal Power Commission* v. *J. M. Huber Corp.*, 133 F. Supp. 479 (D. N. J.), appeal pending, C. A. 3, No. 11779. Further proceedings in this case have been suspended pending disposition of the instant case.

gathering facilities exempt from Commission regulation under Section 1 (b) of the Act, and that the Northern sales were therefore not made by means of any "facilities subject to the Commission's jurisdiction" as required by Section 7 (b) as a prerequisite to Commission jurisdiction over abandonments. The Examiner noted that "it is physically impossible to make a sale and delivery of natural gas without having facilities therefor" (R. 17a) and pointed to specific facilities (*i. e.*, the stub pipe, connections and the valves) used by petitioner solely for the purpose of making the requisite delivery (R. 19a–20a). He also rejected petitioner's further contention that, since it was unwilling to continue the Northern service, the Commission may not, under Section 7 of the Act, require it to continue the sales which it had been making since before 1942; the Examiner commented that acceptance of petitioner's position "would be to accord the recalcitrant person who has failed or refused to comply with the provisions of the Natural Gas Act an advantage over those who have fully complied during the years" (R. 21a). The Examiner accordingly refused to permit abandonment of petitioner's Northern sale and issued a certificate of public convenience and necessity therefor (R. 21a). The Commission, after argument, affirmed the decision of the Presiding Examiner in its entirety (R. 29a–30a).[7]

[7] While the matter was still pending before the Commission, petitioner filed with the Commission a unilateral rate increase on its Northern sales. This increase was suspended by the Commission and subsequently rejected on April 13, 1956, as violative of the Northern contract, on the authority of *United*

ARGUMENT

Petitioner admits that it is a natural-gas company generally subject to Commission regulation under the Natural Gas Act and it does not challenge the Commission's finding that neither the present nor future public convenience or necessity permits the abandonment of its sale to Northern. Nevertheless, petitioner continues to urge that Section 7 (b) of the Act does not apply to its proposed abandonment of the sale on the ground that all of its facilities are production or gathering facilities, exempt from Commission regulation under Section 1 (b) of the Act, and consequently that it has no facilities "subject to the Commission's jurisdiction" by which it makes these sales, as required in Section 7 (b). In addition, petitioner contends that, although it is a "natural-gas company" and has been selling the gas to Northern for resale since before February 1942, the Commission improperly issued a certificate of public convenience and necessity for the Northern sales since petitioner is now unwilling to continue the service.

Neither contention has merit. Both the requirement that petitioner obtain a certificate for its admittedly jurisdictional sales and the Commission's authority to approve abandonment of those sales are necessary corollaries of this Court's determination in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, that independent producers engaged in wholesale sales in interstate commerce are "natural-gas com-

Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U. S. 332. A Section 5 (a) investigation of petitioner's Northern rates was initiated on the same date.

panies," subject to Commission regulation under the Natural Gas Act. For if petitioner need not be certificated and can abandon its services at will, the Commission is denied the power to regulate it effectively. Moreover, the court below sustained the Commission's specific finding that petitioner made its Northern sales by means of particular facilities which, as a factual matter, were neither production nor gathering facilities, and hence the sales fell squarely within the narrowest reading of the language of Section 7 (b).

1. (*a*) The Natural Gas Act applies "to the sale in interstate commerce of natural gas for resale for ultimate public consumption," but not "to the production or gathering of natural gas" (Pet. App. 1a). This Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, held that wholesales in interstate commerce made by producers and gatherers of natural gas (the so-called "independent" producers) are subject to the Act, despite the fact that, aside from selling the gas, they engage only in production and gathering, both of which operations are in other respects not subject to the Commission's jurisdiction.

At the root of the *Phillips* decision was the Court's recognition that the "overriding congressional purpose [in enacting the Gas Act] was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business" (347 U. S. at 682–683; see Mr. Justice Frankfurter concurring, *id.* at 685–687). Concluding that the "jurisdic-

tion of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation" (*id.* at 681), the Court held that a sale of natural gas for resale in interstate commerce is not part of the gathering process which is subject to state control and exempted by Section 1 (b), since "production and gathering, in the sense that those terms are used in § 1 (b), end before the sales by [independent producers] occur" (*id.* at 678). See *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 692–693. And in distinguishing between the sales in interstate commerce which are the end product of producing and gathering, and the "physical activities, facilities, and properties used in the production and gathering of natural gas" (*id.* at 678), this Court made it clear that the Section 1 (b) exemption did not cover every incident of the "business" of producing and gathering so as to make the sales an "integral part" of that business (*id.* at 681).

Petitioner's argument, that its gathering or collecting facilities are wholly within the Section 1 (b) exemption, even insofar as they are immediately used in connection with interstate sales which are admittedly subject to Commission jurisdiction and are necessary in carrying out those sales, is, as the court below pointed out (Pet. App. 9a), almost identical to the argument rejected by this Court in *Phillips* that the "business" of making sales in interstate commerce is exempt from regulation since, viewed from the economic standpoint, the sales, being the ultimate objective of production and gathering, came within the "production or gathering" exemption (347 U. S.

at 681). *Phillips* held that Congress intended the interstate sales of independent producers to be regulated effectively (see *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 520) and control over the abandonment of service is as much a normal incident of public utility regulation as is rate supervision.

Nevertheless, petitioner undertakes to distinguish between its sales, which admittedly are subject to regulation, and the physical means of delivery of the gas consummating the sale, which it insists is not. But Section 7 (c) of the Act (Pet. App. 1a–2a), as amended in 1942 (56 Stat. 83), requires certification of *any* facilities used in making jurisdictional sales of natural gas.[8] Section 7 (b) gives the Commission power to approve or disapprove abandonment of services "rendered" by means of "facilities subject to the jurisdiction of the Commission." Petitioner's position is not that none of its facilities is used in making its jurisdictional sales, but rather that all of its facilities are non-jurisdictional, since also used for production and gathering. However, there is nothing in the Act providing that facilities used by a natural gas company in connection with jurisdictional activities are wholly beyond the Commission's authority because also used for non-jurisdictional activities. The

[8] Since the present language of Section 7 (c) was added by amendment in 1942, it throws no direct light on the original intent of Congress in enacting Section 7 (b). The Act, however, must be interpreted by the courts (and applied by the Commission) as an internally consistent framework of regulation. Since 1942 it has expressly required Commission certification of "sales facilities".

accepted doctrine is to the contrary,[9] in line with this Court's edict that "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed." *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690–691.

Moreover, it is clear that the Act, when read as a whole, gives the Commission sufficient authority over the facilities underlying any jurisdictional sale to allow effective regulation of that sale, and, as we have pointed out, when this Court in *Phillips* recognized that the Act applied to wholesales made by independent producers, it also recognized that the Commission's jurisdiction extended to the facilities underlying those sales to the extent necessary to permit effective regulation of the sales themselves. The premise underlying *Phillips* is articulated in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581. There, the Commission, in fixing the rates for interstate wholesale sales of an integrated pipeline

[9] *United States* v. *Public Utilities Commission*, 345 U. S. 295, 316–318; *Pennsylvania Water & Power Co.* v. *Federal Power Commisson*, 343 U. S. 414, 419–420; *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 535–536; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 63–73; *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 961–966 (C. A. 2), certiorari denied, 319 U. S. 741. While these cases arose under the Federal Power Act, the jurisdictional provisions of that Act and of the Natural Gas Act are substantially the same and have been so construed by the courts. *United States* v. *Public Utilities Commission*, 345 U. S. 295, 311; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, 479 (C. A. 7), certiorari denied, 345 U. S. 934; *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679, 682 (C. A. 9).

company, included the company's production and gathering facilities in the rate base. This Court, in sustaining the Commission's action over the pipeline's strenuous objection, stated that "[we] must read §1 (b) in the context of the whole Act" (324 U. S. at 602). When compared with the Act's other provisions dealing with the "normal conventions of rate making," the Section 1 (b) exemption was found to prohibit Commission control over the physical activity of producing and gathering itself ("the drilling and spacing of wells and the like") but not to "preclude the Commission from reflecting the production and gathering facilities in the rate base" (324 U. S. at 602–603). By parity of reasoning, the facilities underlying petitioner's sales may be "referred to" insofar as necessary to sanction control over abandonment of those sales.[10]

[10] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, on which petitioner relies, is not to the contrary. The question there was whether a pipeline could abandon, not the service made possible by its exempt gathering facilities, but other facilities underlying the service, consisting in that case of certain gas leaseholds. The leased acreage of which the company sought to dispose was undeveloped and thus remote from its current operations. This Court concluded that to extend the Commission's jurisdiction into what was an "essential part of production" (337 U. S. at 505) would be inconsistent with the "production and gathering exemption". Here, the facilities in question are immediately necessary in making the sales, and it is the sales themselves (admittedly subject to regulation) which petitioner seeks to abandon. A further distinction is that the States can and do regulate transfers of gas leaseholds (337 U. S. at 503) but not abandonment of interstate services.

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515, 531, on which petitioner also relies heavily (Pet. 22–23), appears inapposite, since the Court there did not

Further supporting the Commission's jurisdiction is the primary purpose of the Act which, as this Court recognized in *Phillips* (347 U. S. at 682–683), was to "plug the 'gap'" resulting from constitutional limitations on state regulation of the natural gas industry; the states do not, and cannot, undertake to regulate abandonment of interstate sales. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. at 681, 683; *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U. S. 44; see *Pennsylvania* v. *West Virginia*, 262 U. S. 553. Abandonments by independent producers which are otherwise subject to the Act can have as disastrous an effect on the public as cessation of service by a pipeline or an integrated company.[11] *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 693. As this Court recognized in *Phillips* (347 U. S. at 685):

> Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. * * *

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decide that the company's facilities were not subject to regulation, but only that the "local distribution" exemption in the Power Act must be accorded substantial effect. But compare *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 469–474; *Interstate Natural Gas Co.*, v. *Federal Power Commission*, 331 U. S. 682, 690–691. See also fn. 9, p. 13, *supra*.

[11] Petitioner's theory would lead to the anomalous result that, although independent producers as well as the pipeline companies are natural gas companies subject to the Act, Section 7 (b) would be applicable to abandonments only by pipeline companies.

(*b*) While we believe that Section 7 (b) clearly applies to an abandonment by an independent producer of any wholesale sale of gas in interstate commerce, there is an additional ground supporting the decision below. The Commission found, based on substantial evidence, that petitioner made the Northern sales by means of facilities not used for production and gathering and hence "subject to the jurisdiction of the Commission" within the meaning of Section 7 (b) (Pet. App. 10a–11a). The facilities in question were the "T" of valves and pipe (see the Statement, *supra,* pp. 4–5, 8) which connected petitioner's pipes with Northern's. The sole purpose of these facilities, as found both by the court and the Commission (R. 19a–20a; Pet. App. 10a–11a), was to provide means for delivering petitioner's gas to Northern pursuant to the sales contract. Were petitioner to put into effect its plan to terminate the Northern sales, undoubtedly it would either break the connection between its lines and Northern's pipe and disassemble the "T", or simply abandon use of those facilities. Since some of petitioner's facilities thus served no gathering or collecting function, but simply made possible the physical delivery of the gas to Northern, they were "sales" rather than "gathering" facilities, and as such subject to the Commission's jurisdiction under Section 7 (c) of the Act. These particular facilities provided a sufficient and unchallengeable basis for the Commission's jurisdiction over an abandonment proceeding under Section 7 (b) of the Act. See *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 689–693.

2. Petitioner further urges that, since it is unwilling to continue the Northern sales and Section 7 (e) is couched in terms of a "willing" seller, it was improper for the Commission to issue a certificate of public convenience and necessity for the sale. However, Section 7 (e) deals solely with new, prospective service ("service proposed") and is inapplicable here.

Rather, in issuing the certificate, the Commission relied on the proviso in Section 7 (c) for the issuance of so-called grandfather certificates to natural gas companies engaged in jurisdictional sales on February 7, 1942.[12] Petitioner admits that it was so engaged on February 7, 1942, but rests its attack on the ground that it had not applied for the grandfather certificate within 90 days of February 7, 1942, as required in the proviso (Pet. 30). Petitioner thus seeks to avoid regulation by relying on its own failure to comply with the Act as justification for its further non-compliance. As the Presiding Examiner stated (R. 21a):

> * * * To acknowledge such a principle would be to accord to the recalcitrant person who has failed or refused to comply with the provisions of the Natural Gas Act an advantage over those who have fully complied during the years. The law does not recognize any such advantage growing out of noncompliance. * * *

The circumstances surrounding the Commission's delay in asserting jurisdiction over petitioner are, of course, highly significant. Prior to this Court's

[12] The proviso, unlike Section 7 (e), does not require a Commission finding that the company is willing to provide the service.

decision in *Phillips,* it was uncertain whether independent producers of natural gas were subject to the Natural Gas Act. *Phillips* settled that question by holding that the producers had been under the Act from its inception. Congress, in providing the February 7, 1942, date and the 90-day filing provision in Section 7 (c), obviously had been thinking of companies which unquestionably were subject to the Act at that time, and it imposed upon them an obligation to continue their public utility service. Neither Section 7 (c) or 7 (e) contemplated the situation of a "natural gas company" operating without certification for many years, and then seeking to abandon its service at a time when its customers have made heavy investments in reliance thereon.

If the purpose of the proviso in Section 7 (c) as well as the general objectives of the Act are to be served, insistence upon literal compliance either with the 90-day provision or with the February 7, 1942, date would emasculate the proviso, as far as regulation of independent producers is concerned. Cf. *Cabell* v. *Markham,* 148 F. 2d 737 (C. A. 2), affirmed, 326 U. S. 404.[13]

[13] *Cabell* v. *Markham* involved the question of whether a claim to assets vested in the Alien Property Custodian during World War II was defeated by the proviso in Section 9 (e) of the Trading With the Enemy Act, prohibiting the allowance of such claims unless "owing to and owned to the claimant prior to October 6, 1917." Recognizing that, although the Act automatically became operative with the outbreak of World War II, the proviso as originally enacted had dealt with claims arising during World War I, both the Second Circuit and this Court refused to read the date requirement of the proviso literally and held that the pro-

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MELVIN RICHTER,
WILLIAM W. ROSS,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Assistant General Counsel,

WILLIAM L. ELLIS,

HARRY L. ALBRECHT,
Attorneys,
Federal Power Commission.

DECEMBER, 1956.

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viso did not operate to bar World War II claims (326 U. S. at 409):

"* * * The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United States*, 143 U. S. 457 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

See also 148 F. 2d at 739.

U. S. GOVERNMENT PRINTING OFFICE: 1956

FILED
DEC 28 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 600

J. M. HUBER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR INTERVENOR, NORTHERN NATURAL GAS COMPANY, AS RESPONDENT IN OPPOSITION

LAWRENCE I. SHAW,
F. VINSON ROACH,
PATRICK J. MCCARTHY,
2223 Dodge Street,
Omaha 1, Nebraska.

JUSTIN R. WOLF,
1625 K Street, N. W.,
Washington 6, D. C.,
Attorneys for
Northern Natural Gas Company.

Law Briefs—OMAHA LINO-SLUG PRINTING CO.—418 So. 15th St.

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BRIEF FOR INTERVENOR, NORTHERN NATURAL GAS COMPANY, AS RESPONDENT IN OPPOSITION

o———o———o

Petitioner J. M. Huber Corporation (Huber) has, in its Petition for Writ of Certiorari filed herein, set forth sufficient information with respect to the opinions in the Court and Commission below, the jurisdiction of this Court and the statutory provisions which this case involves. Further, Huber's statement of the case contains all of the factual data required to enable this Court to pass on the Petition for Writ of Certiorari, especially in view of the fact that Huber does not challenge, as being

unsupported by substantial evidence, any factual determinations arrived at by the Commission. Pursuant to the provisions of Rule 40 (3) of the Rules of the Supreme Court, 28 U. S. C., Northern Natural Gas Company (Northern), Intervenor-Respondent, will not, therefore, reiterate this information contained in Huber's Petition for Writ of Certiorari. Northern will, however, restate the questions which it believes are presented by said Petition and set forth a brief preliminary statement which, it is hoped, will serve to clarify and delineate the issues involved herein.

QUESTIONS PRESENTED

Does the Federal Power Commission have jurisdiction, under Section 7(b) of the Natural Gas Act, to prevent the abandonment of a sale in interstate commerce of natural gas for resale by a natural gas company?

Does the Federal Power Commission have jurisdiction, under Section 7(c) of the Natural Gas Act, to issue a certificate of public convenience and necessity to a natural gas company which, though presently unwilling, has been willingly selling natural gas, under contract, in interstate commerce for resale since prior to enactment of the Natural Gas Act?

PRELIMINARY STATEMENT

The Court of Appeals for the Third Circuit, in a well-reasoned opinion amply supported by statutory authority and judicial precedent, has answered the above-stated questions in the affirmative.[1] The Court considered and

1 **J. M. Huber Corporation v. Federal Power Commission,** 3rd Cir., 236 F. 2d 550. Hereafter, when referring to this decision, citation will be made to the appropriate page of the Appendix (App.) to Huber's Petition.

rejected each and every argument and pertinent citation of authority raised by Huber. Its decision, construing and applying the appropriate provisions of the Natural Gas Act[2] and prior judicial decisions rendered thereunder, is manifestly correct. Northern will hereinafter show that there is no conflict, in principle or otherwise, between the decision rendered below and decisions of this Court or other courts of appeals.

Further, there is no substantial federal question involved in this case which this Court should undertake to settle at this time. Admissions made by Huber during the course of this litigation have resolved that issue. Huber admits that it is a "natural-gas company"[3] within the meaning of the Natural Gas Act, §1(b). (See Huber's Petition for Writ of Certiorari, p. 6.) It admits that the sale of natural gas to Northern, involved herein, is a sale in interstate commerce for resale and is, therefore, subject to regulation by the Federal Power Commission (Commission).[4] Huber further admits that certain of its facilities are "used in and necessary to" the aforementioned sale to Northern (Huber Pet., p. 24). It disagrees only with the Commission's conclusion, affirmed by the Court below, that such facilities at the point of sale are "sales" facilities rather than "production" or "gathering" facilities. Clearly this administrative con-

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2 52 Stat. 821 (1938), as amended, 15 U. S. C. 717 et seq.

3 "'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Natural Gas Act, §2(6), 52 Stat. 821 (1938), 15 U. S. C. §717a.

4 This recognition of jurisdiction was a prerequisite to Huber's attempt to invoke the "escape" clause of its contract with Northern. The court below clearly recognized this. See App. 5a (n. 1), 8a.

clusion, based as it was on substantial evidence, was within the fact-finding prerogatives of the Commission. Considered in its proper perspective, therefore, this case presents no federal question of such importance as to invoke this Court's discretionary power of review on certiorari.

ARGUMENT

Question I

Section 7(b) of the Natural Gas Act[5] provides that a natural-gas company may not abandon any of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, unless Commission approval is first obtained, and only then upon a finding by the Commission that the supply of gas is depleted to such an extent that continued service is unwarranted or that the present or future public convenience or necessity permit such abandonment. Huber is not contending that these statutory grounds for abandonment exist in this case. Instead, it has persistently maintained that it has no "facilities" subject to the jurisdiction of the Commission and that, therefore, it does not need Commission approval to abandon its sale of gas to Northern. In the face of substantial evidence and findings to the contrary, Huber argues that its facilities at the point of sale to Northern are production and gather-

5 Section 7(b) provides: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." [52 Stat. 824 (1938); 15 U. S. C. §717f(b).]

ing facilities and are, therefore, exempt from Commission jurisdiction under §1(b) of the Natural Gas Act.[6]

This Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, completely refutes this argument of Huber. In that case, as here, the sale involved was made at a point where the interstate journey of such gas had begun. At that point nothing remained to be done by Phillips, or by Huber in this case, relating to the production or gathering of the gas. This Court in the *Phillips* case flatly rejected the argument that such sales are part of the business of producing and gathering natural gas, saying (347 U. S. 672, 678):

> We are of the opinion, however, that the [Commission's] finding is without adequate basis in law and that production and gathering, in the sense that those terms are used in §1(b), end before the sales by Phillips occur.

See also, *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 692. It would appear to be elementary that facilities used to consummate a sale, after production and gathering has ended, would be "sales" facilities rather than "production or gathering" facilities. The Commission (R. 17a)[7] and the court below

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6 Section 1(b) provides: "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [52 Stat. 821 (1938); 15 U. S. C. §717(b).]

7 References to "R. —" are to the printed appendix to Huber's Brief in the court below, which is part of the record certified to this Court.

so held (App. 11a). Huber does not even attempt to show, in support of its argument, what production or gathering function these facilities perform. Its argument, in the final analysis, is that such facilities are known in the industry as "gathering" facilities and therefore should be exempt under §1(b). Such industry characterization is not determinative of their legal status under the Natural Gas Act. Cf. *Phillips Petroleum Company v. Wisconsin*, supra, at pp. 677, 678.

Since a sale of natural gas cannot be made without utilizing certain sales facilities, the Commission's jurisdiction under §7(b) to prevent the abandonment of such facilities, or the service rendered by means thereof, must necessarily be as broad in scope as the jurisdiction granted in §1(b) to regulate the sale itself. This is the clear holding in *Federal Power Commission v. J. M. Huber Corporation*, D. C., New Jersey, 133 F. Supp. 479. That case, which arose out of the same set of facts as the case at bar, involved an injunction proceeding by the Commission to restrain Huber from violating §7(b) of the Natural Gas Act by discontinuing sales of gas to Northern. In rejecting the same argument which Huber is presently advancing to this Court, the District Court held (133 F. Supp. 479, 487):

> * * * this Court has already held that Huber's sales to Northern are within the Commission's jurisdiction and since a sale of natural gas cannot be made without the use of facilities, power to control the sale includes power over facilities and thus Huber does have "facilities subject to the jurisdiction of the Commission" within the meaning of 7(b). See *Hartford Electric Light Co. v. Federal Power Comm.*, 2 Cir., 1942, 131 F. 2d 953, certiorari denied 1943, 319 U. S. 741, 63 S. Ct. 1028, 87 L. Ed. 1698.

It is clear, therefore, that the lower court correctly held that Huber has facilities subject to the jurisdiction of the Commission and must, in order to abandon such facilities or the service rendered by means thereof, meet the statutory requirements of §7(b) of the Natural Gas Act.

Huber's attempt to establish a conflict between the decision herein and decisions of this Court and other courts of appeals has been in vain. The case of *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U. S. 498, chiefly relied on, is so dissimilar factually as to afford no help to Huber. That case involved the sale of gas leaseholds by a natural-gas company. This Court held that the transfer of gas leaseholds is an activity relating to the production and gathering of gas, and, therefore, excluded from the coverage of the Natural Gas Act. But that case contains no language which could possibly be construed to deny jurisdiction of the Commission to prevent the abandonment of facilities used in making sales of natural gas *admittedly* subject to its jurisdiction.

Huber's reliance on the case of *Connecticut Light and Power Co. v. F. P. C.*, 324 U. S. 515, as establishing a conflict in decisions, is also misplaced. That case involved the exemption of local distribution facilities under §201(b) of the Federal Power Act.[8] This Court, in construing this provision of the Federal Power Act, held that the test to be employed is whether the facilities involved are, in fact, "local distribution facilities" (324 U. S. 515, 531). So, in this case, the true test is whether Huber's facilities at the point of sale to Northern are "sales"

8 49 Stat. 847 (1935); 16 U. S. C. §824(b).

facilities or "production or gathering" facilities. The Commission found as a fact that such facilities are "sales" facilities (R. 17a). The lower court affirmed such finding as being based on substantial record evidence (App. 11a). Thus there is not the slightest conflict between the decision herein and this Court's decision in *Connecticut Light and Power Co. v. F. P. C.*, supra.

Huber also attempts to show a conflict between the lower court's decision herein and its earlier decision in *Panhandle Eastern Pipe Line Co. v. F. P. C.*, 3rd Cir., 204 F. 2d 675. The short answer to this argument is, of course, that no conflict exists since the later decision is ordinarily considered controlling within the circuit. There is in fact, however, no conflict between the two decisions since the *Panhandle* case involved the question of the Commission's authority, under §7(a) of the Natural Gas Act, to compel a natural-gas company to enlarge its transmission facilities.

Huber has, therefore, failed to present any convincing reason why this Court should undertake to review the decision herein respecting the Commission's authority to prevent the abandonment of facilities, or services rendered by means thereof, under §7(b) of the Natural Gas Act.

Question II

Having once established that Huber is a natural-gas company subject to all of the provisions of the Natural Gas Act, and the rules and regulations of the Commission issued pursuant thereto, there is no problem respecting the Commission's authority to issue a certificate of

public convenience and necessity covering the sale and service involved. Under §7(c)[9] of such Act the burden is upon Huber to obtain such a certificate. Its failure to do so subjects it to the penalty provisions of said Act. Its mere unwillingness to serve constitutes no defense, of course, to noncompliance with the law.

Disregarding Huber's obligation to obtain a certificate, however, it is clear that the Commission has statutory authority to issue a certificate in this situation. Section 7(c) of the Natural Gas Act prohibits a natural-gas company from engaging in the transportation or sale of natural gas subject to the jurisdiction of the Commission "unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." The "grandfather clause" of such sec-

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9 Section 7(c), as amended on February 7, 1942, and as presently effective, provides: "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: **Provided, however,** That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful." [52 Stat. 825 (1938), as amended; 56 Stat. 83 (1942); 15 U. S. C. §717f(c).]

tion provides that the Commission shall issue certificates without further proof of public convenience and necessity to companies engaged in such transportation or sale on the effective date of the amendatory Act, if applications therefor are made within ninety days thereof. Huber contends that since its application for a certificate was not made until September 24, 1954, it may not be issued a certificate under §7(c). It argues that such a certificate must be issued under §7(e),[10] which requires a "willing" applicant.

The Commission (R. 13a-16a) and the Court (App. 12a-13a) below correctly held that Huber's failure to apply for a certificate within ninety days of the date of the amendatory Act did not now deprive the Commission of jurisdiction to issue a certificate under §7(c). Huber was making jurisdictional sales and rendering jurisdictional service on the date of the amendatory Act and has continued to do so until the present time, all without benefit of a certificate. It now seeks to avoid regulation by relying on the fact that it failed to obtain a certificate under Section 7(c) within the time prescribed therein.

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10 Section 7(e) provides: "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." [56 Stat. 84 (1942); 15 U. S. C. §717f(e).]

Its argument that it did not do so because the Commission had failed to assert jurisdiction over independent producers until 1954 does not alter the status of the law. The decision in the *Phillips* case, *supra,* did not effect any change in the law. It was merely an enunciation and declaration of the law as it has existed since the passage of the Natural Gas Act in 1938, as amended in 1942. The action of the Commission in requiring independent producers who were making jurisdictional sales *on* and after June 7, 1954, to obtain certificates covering such sales was, therefore, in complete harmony with the letter of the statute, as construed in the *Phillips* case.

The Commission (R. 16a) and the Court below (App. 13a-14a) also correctly held that §7(e) applications relate to new service and not to service in effect on February 7, 1942. Huber's unwillingness to accept a certificate and continue to sell gas to Northern is, therefore, not pertinent to a determination of the Commission's authority to issue a certificate under §7(e). The statement of the court below in passing upon Huber claim of "unwillingness" to serve is especially illuminating (App. 14a):

> Irrespective of Section 7(e), under the law and the facts petitioner's unwillingness to accept its certificate offers no real problem. The jurisdictional sections of the Act, 1(b) and 7(b) obviously do not rely upon the certificate provisions of 7(e). The pertinent amendments to the latter did not come into existence until almost four years after Sections 1(b) and 7(b) had been enacted. In Section 7(e) as amended there is nothing about the need of a gas company accepting a certificate. As we see it, with the certificate properly issued, Huber's attempted defiance of the Commission's rightful exercise of its authority is of no importance.

Huber's failure to establish a conflict of decisions on this question of the Commission's authority to issue a certificate under §7(c), and the obvious correctness of the lower court's decision herein, justify this Court's denial of certiorari on this issue raised in Huber's petition.

CONCLUSION

Northern respectfully submits that Huber has presented no special and important reasons why this Court should exercise its discretionary powers of review in this case. The affirmance by the court below of the Commission's order presents no conflict of decisions or need for further review. The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

LAWRENCE I. SHAW,
F. VINSON ROACH,
PATRICK J. McCARTHY,
2223 Dodge Street,
Omaha 1, Nebraska.

JUSTIN R. WOLF,
1625 K Street, N. W.,
Washington 6, D. C.,
Counsel for Northern Natural Gas Company, Intervenor-Respondent.